**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

Parallel Networks, LLC, Plaintiff, v. Abercrombie & Fitch Co., *et al.*, Defendants.	No. 6:10-cv-00111-LED Jury Trial Demanded

JOINT MOTION BY ALL PARTIES TO BIFURCATE DAMAGES ISSUES

Plaintiff Parallel Networks, LLC ("Parallel Networks") and all defendants jointly move this Court to bifurcate the liability issues in this action from the damages issues and to stay damages discovery and trial until final resolution of the liability issues, including through appeal to the United States Court of Appeals for the Federal Circuit ("Federal Circuit") if necessary. This joint motion is made by all parties to this action. The parties believe that bifurcation will promote the efficient resolution of this action, help conserve limited judicial resources and enhance the likelihood of settlement.

In support of this joint motion, the parties show:

1. In this action, Parallel Networks has charged the defendants with infringement of U.S. Patent No. 6,446,111 ("the '111 patent"). The Court has entered a Discovery Order (D.I. 279) and a Docket Control Order (D.I. 280). A five day trial is scheduled to begin on February 13, 2012.

2. The liability issues in this action are as follows. Parallel Networks expects to assert at trial infringement of 11 to 15 claims of the '111 patent (depending on the defendant and the Accused Instrumentality) against the presently remaining defendants, and for that reason,

Parallel Networks contends that it is entitled to be compensated for the alleged infringement; defendants deny all of Parallel Networks's liability and damages contentions. The defendants are expected to contend at trial that the asserted claims are not infringed, are invalid, and are not enforceable (along with other defenses).

3. Some of the liability issues are likely to be common for all defendants, *e.g.*, the defendants' invalidity and unenforceability contentions. The damages issues, on the other hand, require the consideration of legal and factual factors not relevant to the determination of liability and are expected to be partially separate from liability issues (though there may be some commonalities, e.g., in determining a reasonable royalty). Thus, the bifurcation of liability and damages issues (for both discovery and trial) through appeal to the Federal Circuit will likely result in the conservation of scarce judicial resources and thus promote judicial efficiency; bifurcation will also conserve the parties' resources. *Intel Corp. v. CSIRO*, 2008 WL 5378037, at *5 (E.D.Tex., Dec. 23, 2008) ("*CSIRO*"). Additionally, the final resolution of the liability issues by the Federal Circuit will likely promote settlement and may therefore result in the elimination of the need for any damages discovery or trial at all with respect to some or all of the defendants.

4. In any complex litigation, one of a court's most useful tools for maximizing efficiency is bifurcation. *CSIRO*, 2008 WL 5378037, at *2. A court's power to bifurcate trial and discovery has long been established and is reflected in Fed. R. Civ. P. 42(a) that authorizes bifurcation "in furtherance of convenience or to avoid prejudice, or to expedite and economize." Certainly, proceeding to trial on liability and damages issues simultaneously in patent cases involving "many parties" may promote inefficiency. *Id.* at *5. And so, the complexity of damages issues in patent cases makes them candidates for special trial management, particularly

bifurcation. In addition, bifurcation is particularly appropriate in patent cases since a finding on the issue of liability is an appealable interlocutory order to the Federal Circuit under 28 U.S.C. §1292(c)(2), allowing for a final liability determination before proceeding to the damages phase of the case.

5. Bifurcation will also aid the Court through the avoidance of likely pre-trial and trial issues that the Court may need to resolve, such as discovery disputes, challenges under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), challenges to the sufficiency of damages theories and defenses, consideration of the admissibility of exhibits, and the like. And, bifurcation will also benefit the parties by enhancing efficiency through the possible avoidance of damages discovery and trial. Finally, the parties believe that a decision on the issue of liability by this Court or the Federal Circuit will have a strong likelihood of promoting the possibility of settlement, thus potentially avoiding the damages issue altogether.

6. The parties agree that the issue of willful infringement will not be bifurcated and will be addressed in the liability phase of this action. The parties agree that discovery on all liability issues will not be bifurcated.

WHEREFORE, for the foregoing reasons, the parties request that the Court bifurcate the issue of damages for purposes of trial and discovery, thereby staying damages discovery pending final resolution of the liability issues until the completion of any appeal or other judicial proceeding. An appropriate form of order is submitted herewith.

Dated: December 23, 2010

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Plaintiff and Defendants have conferred, and that this Motion is jointly submitted.

/s/ Charles Craig Tadlock
One of the Attorneys for Parallel Networks, LLC

CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served this 23rd day of December 2010, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

/s/ Charles Craig Tadlock
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